

Supplemental Questions and Answers
Revenue Procedure 2002-67
February 27, 2003

Question 1:

Holding Company (HC) was the parent of an affiliated group filing a consolidated tax return including Subsidiary (S). Before October 19, 1999, S engaged in a contingent liability transaction. On the HC consolidated tax return for the year in which the contingent liability transaction occurred, HC reported the purported capital loss resulting from S's sale of the stock it received in the purported section 351 transaction. Further the contingent liability transaction resulted in claimed capital loss carrybacks and carryforwards.

S was the transferor and Liability Management Company (LMC) was the transferee in the purported section 351 transaction. Although eighty percent or more of LMC's stock was owned by S, LMC was not part of the HC consolidated group during the taxable year in which the contingent liability transaction occurred or in any taxable year subsequent to the taxable year in which the contingent liability transaction occurred. LMC claimed deductions associated with the transferred liability.

In a taxable year after the taxable year in which the contingent liability transaction occurred but before March 6, 2003, HC sold all of its stock in S to an unrelated corporate entity. Upon leaving the HC consolidated group, S was allocated a portion of the HC consolidated group's capital loss resulting from S's disposition of its LMC stock received in the contingent liability transaction. S and LMC and S and the unrelated corporate entity do not file on a consolidated basis because S is an ineligible corporation under section 1.1502-47. Finally, when S and LMC become eligible to join in filing a consolidated return under section 1.1502-47, S and LMC will join in the unrelated corporate entity's group and will file on a consolidated basis.

Which entity, HC or S may elect to participate in one of the resolution procedures contained in Rev. Proc. 2002-67 and to what extent will the income inclusion requirement contained in section 5.02 apply if the taxpayer elects to participate in the fixed concession procedure?

Answer 1:

Both HC and S must agree to the provisions of the resolution procedure elected. Because S was a member of the HC consolidated group during the taxable year in which the contingent liability transaction occurred and S joined in the filing of the HC consolidated return for that year, and, as noted above, S carried out of

the HC consolidated group a portion of the capital loss attributable to the contingent liability transaction, any election to participate in the resolution procedures contained in Rev. Proc. 2002-67 must be signed and submitted by officers of both S and HC.

Because LMC has not been part of the HC consolidated group, the income inclusion requirement does not apply to HC. However, if LMC becomes a member of the HC consolidated group, the income inclusion requirement will apply. Further, if after the application of the Fixed Concession Procedure, S is determined to have carried out of the HC consolidated group any unused capital loss under the provisions of section 1.1502-21(b) and LMC becomes a member of S's new consolidated group (or some member of S's consolidated group becomes a successor to LMC), the income inclusion requirement will apply to the extent of the capital loss carried out of the HC consolidated group.

Question 2:

If a taxpayer elects to participate in the Fixed Concession Procedure contained in Rev. Proc. 2002-67, and the Electing Taxpayer and the transferee determine that the Electing Taxpayer, not the transferee, will be entitled to the tax benefits resulting from the contingent liability transaction, to what extent does this agreement apply to the transferee's deductions for taxable years before the 2003 taxable year?

Answer 2:

In general, an agreement between the Electing Taxpayer and the transferee corporation that the Electing Taxpayer will be entitled to the tax benefits resulting from the contingent liability transaction does not affect tax benefits attributable to the transferred liability claimed by the transferee corporation in taxable years before the 2003 taxable year. However, Rev. Proc. 2002-67 does not preclude the Electing Taxpayer or the transferee corporation from filing amended returns provided that none of the years involved is barred by the period of limitations. If a transaction is resolved under the Fixed Concession Procedure, the Service will not challenge the identity of the taxpayer entitled to the tax benefits resulting from the transferred liability for years prior to 2003 provided that any such tax benefits are claimed no more than once in the aggregate.

Question 3:

May a taxpayer electing to participate in the fixed concession program contained in section 5 of Rev. Proc. 2002-67 opt to forgo all of the claimed capital losses and eliminate the income inclusion requirement of section 5.02?

Answer 3:

No. The Fixed Concession Procedure does not provide for this result. However, Rev. Proc. 2002-67 does not preclude a taxpayer from filing an amended return to forgo the claimed capital loss provided that none of the years involved is barred by the period of limitations. Such taxpayer is not eligible for the resolution procedures contained in Rev. Proc. 2002-67.